

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

ARAMARK EDUCATIONAL SERVICES, INC.

Employer
and

Case No. 29-RC-11432

LOCAL 621, UNITED CONSTRUCTION TRADES
& INDUSTRIAL EMPLOYEES INTERNATIONAL
UNION, INTERNATIONAL UNION OF JOURNEYMEN
AND ALLIED TRADES

Petitioner
and

UNITED SERVICE EMPLOYEES UNION, LOCAL 377,
RETAIL, WHOLESALE AND DEPARTMENT STORE UNION,
UNITED FOOD AND COMMERCIAL WORKERS

Intervenor

REPORT ON CHALLENGES

On April 2, 2007,^[1] Local 621, United Construction Trades & Industrial Employees International Union, International Union of Journeymen and Allied Trades, herein called the Petitioner or Local 621, filed a petition seeking to represent certain employees employed by Aramark Educational Services, Inc., herein called the Employer or Aramark. United Service Employees Union, Local 377, Retail, Wholesale and Department Store Union, United Food and Commercial Workers, herein called the Intervenor or Local 377, intervened on the basis of a showing of interest.

Pursuant to a Stipulated Election Agreement signed by the parties and approved by the undersigned on April 16, 2007, an election by secret ballot was conducted on May 10, 2007, among the employees of the Employer, in the following unit:

^[1] All dates hereinafter are in 2007 unless otherwise indicated.

All canteen workers, commissary workers, cafeteria employees, cashiers, bakers helpers, kitchen workers and waiters, waitresses, bartenders and warehousemen, but excluding all C.W. Post student employees, part-time employees scheduled for twenty (20) hours or less per week, three (3) working chefs, professional employees, guards, watchmen, and supervisors as defined in Section 2(11) of the Act.

The Tally of Ballots made available to the parties pursuant to the Board's Rules and Regulations showed 1 void ballot, 51 votes for the Petitioner, 35 votes for the Intervenor, no votes cast against the participating labor organizations and 3 challenged ballots. On June 11, 2007, the undersigned issued a Report on Objections and Notice of Hearing scheduling a hearing to commence June 21, 2007. On June 26, 2007, during the hearing, the parties agreed to set aside the results of the May 10, 2007 election and to make arrangements to proceed to a second election.

On September 10, 2007, a Notice of Second Election issued, scheduling a second election for September 20, 2007. Accordingly, an election by secret ballot was conducted on September 20, among employees in the unit set forth in the Stipulated Election Agreement and employed during the payroll period for eligibility ending September 5.

The Tally of Ballots made available to the parties at the conclusion of the second election pursuant to the Board's Rules and Regulations, showed 39 votes for the Petitioner, 35 votes for the Intervenor, 1 vote cast against the participating labor organizations and 15 challenged ballots. Challenges were sufficient to affect the results of the election. In addition, both the Petitioner and the Intervenor filed objections to the conduct of the election. On October 31, the undersigned issued a Report on Objections and Challenges and Notice of Hearing. At a hearing held on November 20, the parties agreed to hold a runoff election between the two unions. The parties further agreed that a

Norris-Thermador list^{2[2]} would be used. The payroll period eligibility date was November 14.

Prior to this election, the parties entered into a separate agreement regarding the eligibility of four individuals, Yvon Hippolite, Billy Pierre, Ebertho Pierre, and Robert Hutchenson. These individuals had been terminated by the Employer prior to November 14. Local 377 was processing grievances on behalf of these individuals. The parties agreed that these four individuals could vote subject to challenge and that their eligibility to vote would be contingent upon an arbitrator's decision to reinstate them.

An election by secret ballot was conducted on February 28, 2008, among employees in the unit set forth in the Stipulated Election Agreement and employed during the payroll period for eligibility ending November 14.

The Tally of Ballots made available to the parties at the conclusion of the third election pursuant to the Board's Rules and Regulations, showed the following results:

Approximate number of eligible voters	102
Number of void ballots	0
Number of ballots cast for the Petitioner (Local 621)	46
Number of ballots cast for the Intervenor (Local 377)	45
Number of votes cast against participating labor organizations	0
Number of valid votes counted	91
Number of challenged ballots	2
Number of valid votes counted plus challenged ballots	93

Challenges are sufficient in number to affect the results of the election.

The parties challenged the ballots of Ebertho Pierre and Yvon Hippolite based on the agreement of the parties.

^{2[2]} Norris-Thermador Corp., 119 NLRB 1301 (1958).

Pursuant to Section 102.69 of the Board's Rules and Regulations, the undersigned caused an investigation to be conducted concerning the above-mentioned challenges, during which the parties were afforded full opportunity to submit evidence bearing on the issues. The undersigned also conducted an independent investigation. The investigation revealed the following:

Yvon Hippolite and Ebertho Pierre were terminated prior to the November 14 eligibility date. Local 377 is processing grievances regarding their terminations. Arbitrations are currently scheduled for late March and early April 2008 for Hippolite and Pierre, respectively. Both these individuals are named in the parties' agreement that their eligibility would be contingent on an arbitrator's decision whether to reinstate them.

Discussion

It is well settled that to be eligible to vote in a Board election, an employee must be employed in the unit during both the eligibility period and on the date of the election. See Plymouth Towing Company, Inc., 178 NLRB 651 (1969); Choc-ola Bottlers, Inc., 192 NLRB 1247 (1971); Stockham Fittings, Inc., 222 NLRB 217, fn. 2 (1976). In general, it is the party seeking to exclude an individual from voting for a collective bargaining representative that has the burden of establishing that an individual is in fact ineligible. See Bo-Ed, Inc., d/b/a Golden Fan, 281 NLRB 226, 231 fn.24 (1986); Hospital Del Maestro, 323 NLRB 93 (1997).

In this case, Hippolite and Pierre were both terminated prior to November 14, the cutoff date for eligibility.^{3[3]} However, prior to the election, the parties agreed that their eligibility would be contingent upon an arbitrator's decision to reinstate them. Local 377

^{3[3]} In the absence of an unfair labor practice charge, the Board will ordinarily presume a termination to be for cause and the employee ineligible to vote in an election. Texas Meat Packers Inc., 130 NLRB 279 (1961).

has grieved these terminations and arbitrations are currently scheduled for both employees.

The Board has held in abeyance the resolution of challenged ballots to allow the parties to determine voter eligibility through their contractual arbitration process. See Mono-Trade Co., 323 NLRB 298 (1997); see also Morgan Services Inc., 339 NLRB 463, 463 (2003) (holding objections in abeyance to allow parties to litigate the issue in arbitration). In my view, this course is appropriate in the instant case. The parties have agreed to this approach and arbitrations have been expeditiously scheduled for both individuals. Accordingly, I will defer decision on the challenge to Hippolite and Pierre's ballots until these grievances have been decided by an arbitrator.

In order to ensure prompt resolutions of the challenges, I direct that Local 377 and Aramark each file a report with the undersigned regarding the status of each grievance within seven days of receiving this report. I further direct that Local 377 and Aramark shall thereafter file biweekly status reports. When an arbitrator issues awards on Hippolite or Pierre, Local 377 and the Employer shall each forward a copy of the award to the undersigned. If an arbitrator fails to issue a decision after a reasonable period of time regarding either individual, the parties may request the undersigned to reconsider the decision to defer. See Morgan Services, 339 NLRB at 463.

SUMMARY AND RECOMMENDATIONS

In summary, I have deferred decision on the challenges to the ballot of Yvon Hippolite and Ebertho Pierre. I have directed that Local 377 and Aramark file biweekly status reports with the undersigned regarding the status of each grievance until an arbitrator has issued a decision in each case.

RIGHT TO FILE EXCEPTIONS

Under the provisions of Section 102.69 of the Board's Rules and Regulations, Exceptions to this Report may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. The Exceptions must be received by the Board in Washington, D.C. on or before March 26, 2008.^{4[4]}

Dated at Brooklyn, New York, on this 12th day of March, 2008.

"/s/{Alvin Blyer]"
National Labor Relations Board
Two MetroTech Center
Brooklyn, New York 11201

^{4[4]} Under the provisions of Section 102.69(g) of the Board's Rules and Regulations, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its challenges and which are not included in the Regional Director's Report are not part of the record before the Board unless appended to the exceptions or opposition thereto which the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Regional Director's Report shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding.